UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

LAURA WOODS,	)	
	)	
Plaintiff	)	
	)	
v.	)	**CIVIL NO. 01-CV-37-B-C**
	)	
BERRY, FOWLES & CO.,	)	
	)	
Defendant	)	

RECOMMENDED DECISION

Laura Woods has filed suit against Berry, Fowles & Co., a Falmouth, Maine accounting firm, in her capacity as the personal representative of the Estate of Michael Woods, her deceased husband, as well as in her personal capacity as the sole heir of the estate and the intended beneficiary of a policy of life insurance. Woods complains that Berry, Fowles & Co. promised her husband a life insurance policy providing a death benefit of three times his annual salary in partial consideration for his acceptance of employment with the firm. Michael Woods died on March 24, 2000. According to the complaint, Berry, Fowles & Co. failed to fulfill its promise to secure a life insurance policy. From this factual predicate, Woods asserts six claims: (1) breach of contract; (2) negligence; (3) a claim premised on 29 U.S.C. § 1132(a), the Employee Retirement Income Security Act's ("ERISA's") civil enforcement provision; (4) her personal contract claim as a third-party beneficiary of the life insurance policy; (5) negligent misrepresentation; and (6) "promissory estoppel." Berry, Fowles & Co. has now filed a motion to dismiss all state law claims based upon the doctrine of ERISA preemption. (Docket No. 7.)

The District Court having referred the matter to me pursuant to 28 U.S.C. § 636, I now recommend that the Court **DENY** the motion.

RULE 12(b)(6) STANDARD

When considering a Rule 12(b)(6) motion to dismiss, the Court must accept as true the well-pleaded factual allegations of the complaint, draw all reasonable inferences in the claimant's favor, and determine whether the allegations support each element of the challenged claims. Clorox Co. v. Proctor & Gamble Commer. Co., 228 F.3d 24, 30 (1st Cir. 2000); LaChapelle v. Berkshire Life Ins. Co., 142 F.3d 507, 508 (1st Cir. 1998). When the basis for a motion to dismiss is not for failure of the allegations to properly plead the elements of a claim, but an affirmative defense that would bar the claim, "the facts establishing the defense must be clear 'on the face of the plaintiff's pleadings.'" Blackstone Realty LLC v. FDIC, 244 F.3d 193, 197 (1st Cir. 2001) (quoting Aldahonda-Rivera v. Parke Davis & Co., 882 F.2d 590, 591 (1st Cir. 1989)). "[T]he complaint, together with any other documents appropriately considered under Fed. R. Civ. P. 12(b)(6), must 'leave no doubt' that the plaintiff's action is barred by the asserted defense." Id. (citation omitted).

ERISA PREEMPTION AND STATE LAW CAUSES OF ACTION

ERISA's preemption clause, 29 U.S.C. § 1144(a), provides: "Except as provided in subsection (b) of this section, the provisions of this subchapter . . . shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan. . . ." "The term 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law, of any State." 29 U.S.C. § 1144(c)(1). This language is understood to encompass state law causes of action. McMahon v. DEC, 162 F.3d 28, 36 (1st Cir. 1998). "ERISA preemption . . . involves two central questions: (1) whether the plan at issue is an 'employee

benefit plan' and (2) whether the cause of action 'relates to' this employee benefit plan." Id. "The question of whether an ERISA plan exists is a question of fact, to be answered in light of all the surrounding facts and circumstances from the point of view of a reasonable person." Wickman v. Northwestern Nat'l Ins. Co., 908 F.2d 1077, 1082 (1st Cir. 1990) (citation omitted). "A law 'relates to' an employee benefit plan . . . if it has a connection with or reference to such a plan." Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 98 (1983). "Under this 'broad common-sense meaning,' a state law may 'relate to' a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect." Ingersoll-Rand, Co. v. McClendon, 498 U.S. 133, 139 (1990) (quoting Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 47, 95 L. Ed. 2d 39, 107 S. Ct. 1549 (1987)). This "broad common-sense meaning" ostensibly has an outer limit. Shaw, 463 U.S. at 100 n.21 ("Some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan . . . ."). Discerning where this limit falls is one of the most challenging aspects of ERISA litigation. See De Buono v. NYSA-ILA Med. & Clinical Serv. Fund, 520 U.S. 806, 809 n.1 (1997) (describing an "avalanche of litigation" on this issue).

Where state law causes of action are concerned, binding precedent clearly establishes that ERISA preempts those causes that (1) seek to impose liability for alleged breaches of plan provisions or (2) require the claimant to prove the existence of or terms of a plan in order to prove an element of the cause. See Ingersoll-Rand Co. v. McClendon, 498 U.S. 133, 139-140 (1990) (holding that ERISA preempted judicially-crafted cause of action because in order to state a claim a plaintiff must establish the existence of a plan); McMahon, 162 F.3d at 38-39 (holding that ERISA preempted state law statutory, contract and tort claims premised on the denial of plan benefits but not contract claim involving the defendant employer's alleged promise to relocate

the plaintiff); see also Turner v. Fallon Community Health Plan, 127 F.3d 196, 199 (1st Cir. 1997) ("It would be difficult to think of a state law that 'relates' more closely to an employee benefit plan than one that affords remedies for the breach of obligations under that plan."). Such claims are considered to fall within ERISA's "exclusive civil enforcement regime." Hampers v. W.R. Grace & Co., 202 F.3d at 50. In addition to state law claims of this nature, in this Circuit "claims of misrepresentation regarding the scope or existence of benefits" are considered preempted because a successful claim would require the court to calculate damages based, in part, on benefits provided under the plan. Carlo v. Reed Rolled Thread Die Co., 49 F.3d 790, 793-94 (1st Cir. 1995) (holding that ERISA preempted negligent misrepresentation claim premised on employer's misrepresentation concerning level of retirement benefits).

Hampers presents one of the latest chapters in the continuing "alternative enforcement" saga. In Hampers, the First Circuit affirmed a district court decision to try a breach of contract claim as a preempted factual component of the plaintiff's ERISA claim for benefits even though the central factual issue in dispute was whether language in the compensation agreement in question qualified the plaintiff as a participant in a certain ERISA-governed plan and obligated the employer to enroll the plaintiff in the plan. 202 F.3d at 46-48 & 51-54. This opinion appears to have expanded the boundaries of ERISA preemption in this Circuit because it treated a state law breach of contract claim as preempted even though it affirmed a factual finding that the plaintiff was not a plan participant.[1]

Woods argues that because her claims are pleaded in the alternative and the state law causes of action could survive without reference to any ERISA plan, they are not preempted.

[1] Essentially, the Court concluded that because the claim could not exist but for the fact that the other party to the contract was an "ERISA employer with direct control over the administration and operation of the [plan]" (due in large measure to the way the complaint was drafted and certain concessions made by the plaintiff), the claim must be preempted by ERISA, Hampers, 202 F.3d at 53, although it listed additional rationales as well, including that the damages sought were to be measured by the benefits afforded under the plan, see id. at 54.

(Plaintiff's Objection, Docket No. 9, at 2-3.) According to Woods, the promise to procure life insurance may not have involved an employee benefit plan, and there remains a factual issue in this case concerning whether the life insurance policy that Berry, Fowles & Co. promised to obtain was part of an employee benefit plan or simply a lump sum benefit unrelated to such a plan. (Id. at 5-6.) In her own words,

> There is nothing in either the complaint or Defendant's objection which asserts that the [promise to procure a life insurance policy] required either an ongoing administrative program, ongoing investment activity or the payment of any benefit other than a one-time, one event payment. . . . Defendant may have initially chosen to comply . . . by attempting to include [the] decedent in the ERISA plan it provided to other employees, but it provides no information which allows the Court to draw any conclusion about what it promised to do if that route was foreclosed. . . .

(Id. at 8-9.) In my view, Woods' argument is well put. The difficulty exists in reconciling this argument with allegation 17 of the complaint, which reads, "The above-described insurance policy was part of an employee welfare benefit plan (the plan) governed by the Employee Income Security Act of 1974 . . . ." (Docket No. 1, Addendum 1.) This allegation has been admitted by Berry, Fowles & Co. and it is incorporated into Counts IV, V, and VI (Third-Party Beneficiary, Negligent Misrepresentation, and Promissory Estoppel). However, because the ERISA claim is the third count in the complaint, this allegation is not incorporated into Counts I or II (Breach of Contract and Negligence).

Berry, Fowles & Co. makes much of this allegation. In fact, its entire motion hinges on this one factual allegation. (Defendant's Motion to Dismiss, Docket No. 7, at 5, 7; Defendant's Reply to Plaintiff's Objection, Docket No. 10, at 2.) I agree with Berry, Fowles & Co. that the resolution of this motion hinges on how this allegation is construed, but I believe this allegation is capable of supporting more than one interpretation. My concern is with that portion of the allegation reading "the above-described insurance policy." In my view, when construed in the

light most favorable to Woods, "the above-described insurance policy" must be understood as *an* insurance policy that Berry, Fowles & Co. may have attempted to procure in fulfillment of its promise, but not as *the* insurance policy it promised to procure. (For example, contrast allegation 5 of the complaint with allegation 17.) Thus, by attempting to enroll Michael Woods in an ERISA plan that evidently included a life insurance benefit, Woods and her husband's estate may have an ERISA claim if her husband was wrongfully denied participation in the plan. See Hampers, 202 F.3d at 51-53 (treating non-plan participant's action as an ERISA action because his suit sought benefits under the plan). Alternatively, Woods may have viable state law claims based on the alleged promise to secure a generic life insurance benefit. Although the facts may develop in a manner that makes it clear that the *only* promise Berry, Fowles & Co. made was to attempt to enroll Michael Woods in a certain ERISA plan, at this juncture the complaint permits an inference that Berry, Fowles & Co. simply promised to purchase a generic life insurance policy for Michael Woods.

CONCLUSION

Because the facts alleged permit an inference that Berry, Fowles & Co. promised Michael Woods a non-ERISA-governed life insurance policy, the motion to dismiss should be **DENIED**.

NOTICE

> A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten days of being served with a copy thereof. A responsive memorandum shall be filed within ten days after the filing of the objection.
>
> Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated: August 1, 2001

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Margaret J. Kravchuk
U.S. Magistrate Judge

STNDRD

U.S. District Court

District of Maine (Bangor)

CIVIL DOCKET FOR CASE #: 01-CV-37

WOODS v. BERRY FOWLES & CO Filed: 02/26/01

Assigned to: JUDGE GENE CARTER

Demand: $0,000 Nature of Suit: 791

Lead Docket: None Jurisdiction: Federal Question

Dkt # in Kennebec Superior : is CV-01-19

Cause: 29:1132 E.R.I.S.A.-Employee Benefits

LAURA WOODS, Individually and WILLIAM D. ROBITZEK

as Personal Representative of 784-3576

the Estate of MICHAEL WOODS [COR LD NTC]

plaintiff BERMAN & SIMMONS, P.A.

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v.

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defendant 774-1200

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